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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Promotion of Competitive Networks	)	
in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association	)	
International, Inc. Petition for Rulemaking to	)	
Amend Section 1.4000 of the Commission's	)	
Rules to Preempt Restrictions on Subscriber	)	
Premises Reception or Transmission	)	
Antennas Designed To Provide Fixed	)	
Wireless Services	)	
	)	
Cellular Telecommunications Industry	)	
Association Petition for Rule Making and	)	
Amendment of the Commission's Rules	)	
to Preempt State and Local Imposition of	)	
Discriminatory And/Or Excessive Taxes	)	
and Assessments	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

COMMENTS

Adelphia Communications Corporation ("Adelphia"), by its attorneys, hereby respectfully submits these comments in response to the above captioned Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98 ("NPRM") released by the Federal Communications Commission ("Commission") on July 7, 1999. Adelphia owns and operates

cable television systems across the nation, and affiliates of Adelphia provide telephone and other telecommunications and information services in various communities. As such, Adelphia is directly interested in proposals put forth by the Commission in the NPRM, as well as by other commenters in this proceeding.

I. The Commission is Correct that the Focus of this Proceeding Must Be on Removing Barriers to Facilities-Based Competition

Adelphia applauds the Commission's recognition that the focus of this proceeding must be on finding ways to strip away barriers that retard facilities-based competition.[1] In the 1996 Act, Congress unequivocally stated a national policy designed to promote facilities-based competition and added numerous provisions to the Communications Act to accomplish this goal. Most notably, Congress adopted new statutory provisions that remove barriers to facilities-based local exchange competition by requiring local exchange carriers to interconnect with other carriers' networks, thereby providing an incentive for competitors to build their own networks and facilities as opposed to simply reselling the local exchange carriers' services.[2]

To date, the Commission has taken many laudable steps in attainment of that goal, but the Commission must continue to be aggressive in promoting facilities-based competition in all possible competitive arenas. The Conference Report to the 1996 Act states that a fundamental purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy

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[1]NPRM at ¶¶ 3-17.

[2]Telecommunications Act of 1996, Pub. L. No 104-109, 110 Stat.56, § 101 et seq. (1996) ("Telecommunications Act of 1996").

framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[3] Thus, the Commission must explore means by which to bring the benefits of facilities-based competition to all possible telecommunications consumers, including to occupants of Multiple Tenant Environment ("MTE") buildings.

Indeed, there are many reasons why MTE resident access to multiple overlapping communications networks is good policy. Access to more networks brings more service options to both residential and commercial MTE occupants, empowering them to be efficient telecommunications customers. Access to multiple networks also empowers MTE residents to pick and choose from any number of providers for the simultaneous provision of a multitude of telecommunications and video services, efficiently allowing MTE residents the maximum flexibility in choosing the mix of services that best suits their needs. Finally, competitive pressures resulting from overlapping MTE networks encourages all providers to innovate and develop new services that respond to the needs of MTE occupants.

For example, a small business housed in an MTE may be satisfied with the price and quality of "plain old telephone service" provided by the incumbent LEC, but may require a high-speed computer connection for Internet access, a service which is more efficiently provided by a cable operator's broadband plant. On the other hand, a residential MTE consumer may wish to obtain basic cable service and telephone services from the incumbent cable operator, while obtaining satellite programming and Internet access services from a

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[3]H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996) (emphasis added).

competing provider. Another MTE occupant may require an entirely unique telecommunications service that requires custom tailoring by a particular type of facilities-based provider. But whatever each MTE occupant's communications needs and desires may be, each should be able to decide the particular services to take from the broadest possible menu of facilities-based telecommunications and video providers.

In sum, the Commission is to be applauded for recognizing that competition and consumer benefit can best be enhanced if all consumers, including MTE residents, are empowered to mix and match their service choices from a wide selection of competing providers' facilities and services. As described below, the Commission should take affirmative steps in this proceeding to further eliminate barriers to facilities-based competition erected by ILECs and landlords.

II. The Commission Should Address ILEC Restrictions Hindering Facilities-Based Competition by Allowing Competitive Access To ILEC Easements And Rights-of-Way Under Section 224

The first step the Commission can take to promote facilities-based competition is to clearly enable competing facilities-based carriers to obtain, pursuant to the pole attachments provisions of Section 224, access to easements and rights-of-way owned or controlled by utilities. While Congress originally enacted Section 224 in 1978 to ensure that private owners of utility poles did not use their bottleneck control to prevent the development of the then-nascent cable television industry,[4] Congress extended Section 224's protections in 1996 to benefit all

[4]S. Rep. 580. 95th Cong., 1st Sess. 19, 20 (1977).

telecommunications providers.[5] As the Commission has confirmed, the WinStar petition's analysis that a utility's obligation to provide access under the plain language of Section 224 encompasses "poles, ducts, conduits, or rights-of-way,"[6] these obligations also logically extend to ducts, conduits and rights-of-way afforded to utilities in MTEs, as well as to any property that utilities use as part of their distribution networks.[7]

In keeping with the goal of expanding opportunities for facilities-based telecommunications providers, the Commission should take as expansive a view of utility "control" of rights-of-way as possible. For purposes of Section 224, the Commission should consider a utility to control a right-of-way whenever the utility holds a legal right to place its facilities on that property, by virtue of contract, easement, or any other legal mechanism, even if the utility has yet to place its facilities there.[8] If the utility has the legal right to use a certain portion of property, then it "controls" that property, and must provide facilities-based competitors

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[5]Telecommunications Act of 1996 at § 703.

[6]NPRM at ¶ 39; 47 U.S.C. § 224(a)(1).

[7]The Commission should not be concerned about the legislative history from the 1978 Pole Attachments Act that suggests conduits only exist underground. A broadened interpretation of Section 224 and the term "conduit" expands access for competing facilities-based carriers, which is consistent with Congressional intent in the more recent 1996 Act. Obviously, in today's marketplace of expanding telecommunications services, "conduit" will be found in a wider variety of locations than in 1978, and today's MTE riser conduit serves the very same purpose as the underground conduits of 1978. Thus, Section 224 should indeed be deemed to cover riser conduit. In keeping with the changing nature of telecommunications generally, and the changing nature of conduit in particular, the Commission should also amend section 1.1402(i) of its rules to broaden its definition of "conduit."

[8]See Implementation of Section 207 of the Telecommunications Act of 1996, CS Docket No. 96-83; Second Report and Order, 13 FCC Rcd. 23874, 23882-85 (1998), recon. pending, appeal pending sub nom., Building Owners and Managers Association International v. FCC, No. 98-1610 (D.C. Cir. docketed Dec. 23, 1998).

access to that property under Section 224.

Utility control over riser conduit should therefore be deemed to occur whenever a utility holds a legal right to certain portions of a MTE within which to place its facilities, regardless of whether or not it has already run cable through the space allowed for riser conduit. Utilities can gain this control by contracting with the MTE owner, or any other legal mechanism.[9] On the other hand, a utility only has control over the specific space granted to it for extension of its wires, and thus the utility can only grant access to space for which it has a legal right to occupy. If a utility's facilities completely fill the defined space allotted to it within the MTE building, then the utility has no space for which to grant access. However, if there is space where addition of a wire is technically feasible, then the utility should be required to allow access to that space.

Section 224 restricts access to the limits of the given utility's rights-of-way.[10] Thus, for rooftop access to MTEs, Section 224 could only allow facilities-based competitors access to that portion of the roof for which the utility holds a right-of-way. If the utility does not hold a right-of-way, or the utility's rooftop right-of-way does not afford room for a new market entrant's equipment, then that new market entrant cannot gain access to the MTE roof by relying on Section 224, and must enter into its own negotiations with the MTE owner for rooftop access. The Commission must also be cognizant of the fact that Section 224's access provisions do not include access to utilities' distribution wiring. From the very first Congressional pronouncement on the matter, cable television providers could not gain access to the utilities' wires, and the 1996

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[9]Granted, this type of utility "control" is not always easily ascertainable by competing carriers, but many rights-of-way are recorded at local courthouses. Furthermore, visual inspections of property could determine whether a utility's facilities occupy a certain portion of the property.

[10]NPRM at ¶ 39.

Act did not extend access to wires for telecommunications providers. Therefore, in the MTE context, while the Commission should adopt policies that facilitate efforts by facilities-based competitors to place their wires and cables next to utilities' wires and cables within the same duct, conduit and right-of-way, Section 224 is not a *carte blanche* for competitors to seize any incumbent provider's MTE internal wiring.[11]

III. Landlords Often Impose Significant Impediments To Facilities-Based Competition

The second step the Commission should take is to begin to address landlord imposed impediments to facilities-based competition. In the NPRM, the Commission correctly takes note of numerous complaints that in MTEs, facilities-based competition is often frustrated if a competing provider is denied access to the building by a landlord.[12] The Commission is also correct to note the common landlord practice of withholding reasonable, non-discriminatory access to its property as a means to extract an economic windfall from new providers.[13] Indeed, Adelphia has experienced a similar pattern in the video context, where landlords frequently grant exclusive access to the non-franchised MVPD offering them the largest share of revenues or other forms of consideration. This oft-abused practice is a significant impediment to increased MTE facilities-based competition.

As correctly noted by the Media Access Project/Consumer Federation of America ("MAP/CFA") in the MVPD Inside Wiring context, the underlying problem when it comes to competing provider access to MTEs is that landlords will always represent their own interests

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[11]NPRM at ¶ 44.

[12]NPRM at ¶ 51.

[13]NPRM at ¶ 31.

over their tenants' welfare in granting access to their buildings. As observed by MAP/CFA:

> Landlords are profit maximizers, and therefore would be more concerned with accumulating the greatest amount of revenue in return for the lowest risk of damage, long-term investment, or variable costs.[14]

In short, landlords almost always choose to act in their own economic interest rather than to enhance the competitive choices of their residents. In the end, MDU residents are denied the ability to select the optimal mix of service providers to meet their individual needs, and are instead left with a service provider dictated by their landlord.

This discrimination and the resultant denial of choice to MTE residents is no doubt harmful to the public interest, whether in the video or telecommunications context. This is what has lead several states to adopt mandatory access laws in the MVPD context, ensuring that their MTE residents can access the facilities of franchised cable operators regardless of the exclusivity a landlord has granted to another provider. Of these solutions, the Commission should study closely the successful model enacted by the Commonwealth of Virginia. According to Virginia statute, landlords are prohibited from taking any compensation from video providers in exchange for granting access to the residents of MTE buildings.[15] This solution divests Virginia landlords of their incentive to act primarily in their own pecuniary interest, and encourages them to act only in the best interest of their residents. This is a simple solution that promotes the interests of consumers, could work on a national scale, and

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[14]See Media Access Project/Consumer Federation of America Further Comments in CS Docket 95-184 and MM Docket 92-260 at 9.

[15]Va. Code Ann. §55-248.13:2(1997).

does not raise Constitutional takings concerns.[16]

Conclusion

Accordingly, the Commission's rules and policies should be amended to conform to the principles set forth in the foregoing comments.

Respectfully submitted,

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[16] See Multichannel TV Cable Co. v. Charlottesville Quality Cable Co., 65 F.3d 1113, 1124 (4th Cir. 1995) (holding that the Virginia statute prohibiting landlords from taking kickbacks from telecommunications providers does not amount to a regulatory taking or raise just compensation concerns).